The Savings Law Clause in the Constitutions of Caribbean Countries and its Impact on the Protection of Human Rights

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Caribbean Judges' Forum on HIV, Health & Human Rights

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The Judicial Education Institute of Trinidad and Tobago (JEITT) and the Judicial Education Institute of the Organization of Eastern Caribbean States (JEI-OECS), in collaboration with the United Nations Development Program (UNDP), have established a partnership aimed at advancing discussions within the judiciary on crucial topics concerning the rights and respect for people with HIV and other key populations, including men who have sex with men, transgender individuals, and sex workers. This partnership takes the form of the Caribbean Judges' Forum on HIV, Human Rights, and the Law.

Presentation
by
The Honourable Mr Justice Adrian Saunders
President, Caribbean Court of Justice
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Good morning. My brothers and sisters in the law, Dr Charisa-Marie Francois, Director, JEITT and the team from JEITT, representatives from the OECS Judicial Education Institute, Team members from the UN AIDS Multi-Country Office and UNDP LAC, and Representatives of NGOs and stakeholder organisations. Thank you to the JEITT, the JEI OECS and the UNDP, for the honour and pleasure.

Introduction:

This is a topic that is dear to me because the interpretation of Caribbean constitutional savings clauses yields consequences that are of profound significance. Quite apart from the obvious jurisprudential issues that arise, deep and fundamental philosophical and socio-political principles are implicated by these clauses.

It is a source of regret that the two apex courts in the region, the Judicial Committee of the Privy Council (JCPC) and the Caribbean Court of Justice

(CCJ), have diverged in our respective approaches to these clauses. It could well be that one of the sources of divergent jurisprudence is the fact these courts are staffed with judges who are from, and who reside, and have been socialised in different parts of the world. The Privy Council case of *Matthew v The State*[1] and the CCJ case of *Nervais v R*[2] were for example decided by these respective judges. Caribbean judges being naturally 'closer to the ground' than their British counterparts in the JCPC may well be keener to be more sensitive to and pro-active in remediating the debilitating consequences of constitutional or legal provisions that deprive Caribbean people of the full enjoyment of their human rights. The divergence between the two courts on the savings clause could well be an illustration of what Lord Hoffman had in mind when he said this:

> We have been necessarily cautious in doing anything which might be seen as inappropriate in local conditions and although this caution might have occasionally saved us from doing the wrong thing, I am sure it has also sometimes inhibited us from doing the right thing..[3]

A discussion on the savings clause should begin by first examining the context surrounding these clauses. The clauses were originally contained in independence Constitutions; legal instruments that denote, proclaim, and express our inherent

[1] [2004] UKPC 33, (2004) 64 WIR 412 (TT).
[2] [2018] CCJ 19 (AJ), (2018) 92 WIR 178.
[3] Fulton Wilson, 'Privy Council Judge supports CCJ', *Jamaica Observer* (Kingston, 19 October 2003) <https://www.jamaicaobserver.com/news/privy-council-judge-supports-ccj/ >.

right to self-determination; our coming of age as a people and as a nation, after centuries of colonial rule, enslavement and indentureship. The Constitution serves as a fundamental premise upon which we have resolved to build our nations. I consider that, far from being indifferent to these noble concepts, those who are entrusted with the sacred task of interpreting the Constitution, must keep them foremost in their minds. If that does not occur then constitutional interpretation becomes legalistic, perfunctory, unmoored, like a ship without an anchor.

Secondly, some common law countries have no definitive written Constitution, for eg England and New Zealand. We in the Caribbean do have one. The second point I wish to make is that the written expression of one's Constitution never results in a perfect and complete document. There are sometimes notable omissions (eg the right to vote); sometimes some matters are left to be implied (trial within a reasonable time for example). In some respects, a Constitution reminds me of an international treaty where some provisions are left deliberately ambiguous, difficult to interpret. Some provisions are seemingly at odds with other provisions. So too, our Constitutions often throw up seemingly inconsistent provisions. The nations of the world required a whole treaty 'The Vienna Convention on the Law of Treaties' in order to elucidate the rules of treaty interpretation. Judges, who are entrusted by the Constitution to interpret the written document, do not have a similar documented guide to assist in their constitutional interpretation.

The third point I make about the context shaping constitutional interpretation is that, when we seek to construe a particular constitutional provision, we should not regard that provision in a vacuum. One should have regard to the Constitution as a whole as firstly an instrument that embodies a particular ethos, ie a piece of writing that has a particular animating spirit; and secondly, a document that contains provisions some of which are more sacred than others. This is why I said in *McEwan v A-G of Guyana*[4], Courts should be astute to avoid hindrances that would unduly deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. So, if one part of the Constitution may be interpreted in a manner that produces an inconsistency with an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest that requires that this not be done.

Savings Law Clauses and Modification Provisions

There are two types of Savings Clauses in Caribbean Constitutions. There is first of all a special or specific savings clause that purports to deny judicial review of punishments or treatment authorised by any law prior to the coming into effect of the Constitution. The mandatory death penalty was long considered to have

[4] [2018] CCJ 30 (AJ) (GY, (2019) 94 WIR 332.

become an inhumane penalty. But the special savings clause was for many years used to stymie efforts to have the courts declare that punishment to be inhumane and unconstitutional. In 1993, however, the Privy Council opened the door a crack. They narrowed the applicability of this savings clause by holding that the clause may have saved the penalty of death for murder, but it did not save or cover the mode of giving effect to or of applying the punishment. So, if a state took an unduly long time to carry into effect a sentence of mandatory hanging for murder, (say five years or more) then it was fine to challenge the unconscionable delay in executing the sentence because delay was not saved. That's the case of *Pratt v A-G of Jamaica*.[5]

All the OECS States had this special savings clause in their Constitutions. In a later case of *Hughes v R*[6], the ECSC Court of Appeal for the first time further narrowed the applicability of the special savings clause. If the punishment or treatment was mandated by the colonial law, as distinct from being merely authorised by it, the savings clause did not apply. So, mandatory death penalties for murder, which were prescribed by a pre-independence law, escaped the clutches of the special savings clause. This was the case of *Hughes*. These cases of *Pratt* and of *Hughes* illustrate the fact that courts adopt a very restrictive approach to savings clauses. The special savings clause still catches such outdated offences as consensual anal sex whether homosexual or heterosexual.

[5] *Pratt v A-G of Jamaica* [1994] 2 AC 1 (JM PC).
[6] *Hughes v R* [2002] 2 LRC 531 (SLU CA).

The second form of savings clause was more far reaching than the first. It was inserted into the Independence Constitutions of Jamaica, Trinidad and Tobago, Guyana, The Bahamas, Belize, and Barbados. The Constitutions of these states all contained this clause that essentially protected all pre-independence or colonial laws from constitutional challenge. Colonial laws were immunised from any constitutional challenge irrespective of how damaging they were, or turned out ultimately to be, to the enjoyment by a citizen of their fundamental rights. Exceptionally, the clause that was included in the independence Constitution of Belize contained a five year sunset horizon. The general savings clause survives today in its near original form only in Trinidad and Tobago, Guyana, and The Bahamas. Jamaica has replaced its version with a modified provision and the legislature in Barbados recently amended the Constitution of that country specifically to align the clause with the rulings of the CCJ.

Further, because the CCJ is the apex court of Barbados and Guyana, the clause no longer has a debilitating effect in those States. The general savings law clause is, however, extremely problematic in this country, Trinidad and Tobago.

The Modification Provisions

It is important now to segue into what is known as the modification provision. Caribbean Constitutions were ushered into existence by a parent law. For the Independence Constitutions, that parent law was an Order in Council of the UK.

The Independence Constitutions were all a Schedule appended to a British statutory instrument or Order in Council. In the Republican Constitutions of Guyana and Trinidad and Tobago, the Constitution is a Schedule attached to a local Act of Parliament. Curiously, in the parent instrument (whether the Order in Council or, in the case of the Republics, the local Act of Parliament), there exists what is called a Modification clause.

Interestingly, the 1961 written colonial Guyana Constitution contained a modification clause that required the court to modify all pre-independence laws to conform with the human rights provisions contained in that 1961 Constitution. And so, the 'savings clause' in the independence Constitution had the effect of saving those pre independence laws in their modified state.

JCPC's Approach to Savings Law Clauses

The divergence between the jurisprudence of the JCPC and of the CCJ largely has to do with the relationship (or lack thereof) between the modification provisions contained in the parent Act and the savings clause contained in the Constitution. The issue has typically arisen in relation to the mandatory death penalty.

There are important cases decided by the JCPC from Trinidad & Tobago. The first is the case of *Roodal v The State.*[7] The effects of that judgment were short

[7] [2005] 1 AC 328 (TT PC).

lived. Roodal was overruled by *Matthew* by a specially convened 9-member Bench which also determined *Boyce v R.*[8]

CCJ's Approach to Savings Law Clauses

The same question came before the CCJ in *Nervais and Severin*. A few months after that the CCJ had to address the savings law issue again in relation to the rights of transgender persons. Since then, the Guyana National Assembly has altered the law.

Last year, in *Bisram v DPP*[9], an appeal from Guyana that had to do with the power a colonial law had given to the Guyana DPP to direct the Magistrate to commit, the savings clause also came up for consideration because the DPP claimed that the existence of the Savings Clause meant that it was not possible to challenge the colonial law.

The JCPC had an opportunity to revisit *Matthew* in *Chandler v The State (No 2) (Trinidad & Tobago)*[10]. They again convened another 9 member Panel but, on this occasion the JCPC doubled down on *Matthew.* Less than three weeks ago, the JCPC tripled down on their jurisprudence in *A-G v Maharaj*[11].

[8] [2004] UKPC 32, [2005] 1 AC 400 (JM).
[9] [2022] CCJ 7 AJ (GY).
[10] [2022] UKPC 19, (2022) 101 WIR 520 (TT).
[11] [2023] UKPC 36 (TT PC).

What are the consequences for Trinidad and Tobago's jurisprudence?

Society's appreciation of what does and what does not infringe human rights is dynamic because human rights have to do with an appreciation of universal values that ennoble and exalt humankind. Those values change over time as societies become more sophisticated. Like many other judges, I subscribe to the view that interpretation of a Constitution must take that circumstance into account. I note Lord Bingham in *Bowe v R*[12]:

> …..It is ordinarily proper, when interpreting a constitution, to regard it as a living instrument capable of reflecting the standards and expectations of society as these change and develop over time. While the meaning of constitutional provisions does not change, their content and application may, and the judicial task is ordinarily to bring an objective, contemporary judgment to bear…

I endorse those comments. I agree entirely with Lord Bingham that the approach taken by his colleagues in *Matthew* does not ensure the protection of fundamental human rights and freedoms. It degrades the dignity of the human person, and it does not respect the rule of law. It is fair to say that roughly 10 – 15% of any human population can be described as LGBTI+. These persons are placed under siege as basic rights which are taken for granted by cisgender heterosexuals

[12] (2006) 68 WIR 10, (2006) 68 WIR 10.

continue to be criminalised by antiquated colonial laws that have long been repealed by the colonial power that introduced the laws here in the first place. In a part of the world where homophobia is common and encouraged in popular art forms, this can be and sometimes is life threatening to innocent persons whose only wish is to get on with their lives in peace. There are reputable studies that have been done on this subject.

Earlier this year, the UN Secretary-General transmitted to the General Assembly the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. The report was prepared in accordance with a Resolution adopted by the UN Human Rights Council in July 2022. Paragraph 47 of the Report is instructive. Under the section "Continued criminalization in violation of international human rights law and standards", the Report notes that the savings clause as applied by Trinidad and Tobago's highest court effectively denies citizens the right to seek judicial protection against human rights violations, including violations of their right to life, and is therefore at the source of the State's failure to meet its obligations under art 2 of the American Convention on Human Rights. The report drew attention to the progressive judgments of the CCJ and the Inter American Court of Human Rights (IACtHR).

In another study titled '*The human right to respect for sexual orientation and gender identity in the Caribbean and Latin America: Current situation and prospects'*[13] published by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders, the authors note that this minority faces not only situations of criminalisation, concentrated in the Caribbean region, but they are also a victim of structural discrimination.

A third study on *Homophobia & Transphobia in Caribbean Media: A Baseline Study From Belize, Grenada, Guyana, Jamaica and Saint Lucia*[14], indicates that the evidence shows that reporting on lesbian, gay, bisexual, transgender and intersex people often is sensationalised and demeaning or LGBTI+ persons are ignored completely by the media. Furthermore, the generalised ridicule of LGBTI+ persons, in combination with threats and violence against LGBTI+ activists and supporters, lead to a limited pool of spokespersons—that is, individuals willing to be publicly associated with promoting non-discrimination and an end to violence.

I make two final points. Firstly, both the judiciary and the legislature have a responsibility to ensure that all existing laws (whether pre-independence, or pre-Republican or post-independence) are first modified to conform to the human rights promised by the Constitution to all citizens before those laws are executed.

[13] Eugenio Raúl Zaffaroni and Leonardo Raznovich, *The human right to respect for sexual orientation and gender identity in the Caribbean and Latin America : Current situation and prospects* (Inter-American Institute of Human Rights, 2021). .

[14] International Gay and Lesbian Human Rights Commission (Outright International) and others, *Homophobia & Transphobia in Caribbean Media: A Baseline Study From Belize, Grenada, Guyana, Jamaica and Saint Lucia* (2015).

This is not an imperative that seeks merely to address the rights of the LGBTI+ community and issues regarding the death penalty. As we saw in the cases of *Bisram* and *Maharaj*, this also has resonance in a wide swathe of laws that are or have become inimical to the full enjoyment of our constitutional rights.

Secondly, as is currently the case in Jamaica, there similarly needs to be in this country, a more vocal, consistent debate in the Press and social media, in the LATT and academic circles, among government and opposition about bringing justice back home to the Caribbean. There is no good reason, not a single one, why at this time, appeals from the Court of Appeal of Trinidad and Tobago should be decided by the JCPC when there exists a Caribbean court, located in Port of Spain, that is capable of doing so. Given the judgments handed down in *Matthew, Chandler and Maharaj*, unless the legislature of Trinidad and Tobago does what that of Barbados has done, the rights of the citizenry of this country will take second place to the outmoded laws enacted by a colonial legislature.

I thank you.